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No. 528

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

NORRIS EDWARD BASS

dong business as

N. E. BASS,

APPELLANT

v.

UNITED STATES OF AMERICA

INTERSTATE COMMERCE COMMISSION, *ET AL*

PETITION OF APPELLANT FOR REHEARING

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STATEMENT

Norris Edward Bass, pursuant to an Act of Congress, 49 U. S. C. 309, filed an application with the Interstate Commerce Commission for a permit authorizing him to engage in operation in interstate commerce as a contract carrier of passengers. The aforesaid application was filed in accordance with the rules and regulations prescribed by the Commission governing such application.

During the hearing of the application, the Atlantic Grey-

hound Corporation, Carolina Coach Company, Inc., Eastern Greyhound Lines, Richmond Greyhound Lines, Inc., and Virginia Stage Lines, all common carriers of passengers operating under certificates of public convenience and necessity issued by the Commission pursuant to 49 U. S. C. 306, entered an appearance and actively opposed the application, before the Commission and before the Court. These common carriers of passengers claim that they have an exclusive right, under the rules and regulations of the Commission made pursuant to 49 U. S. C. 308 (c), to render charter passenger service *and that no one else has the right to ever render contract carrier passenger service*, notwithstanding the fact that these common carriers can not render contract carrier service and that the statute specifically provides for contract carrier passenger service, 49 U. S. C. 309 (b).

It was appellant's view before the Commission and before the Court that although these common carriers of passengers by motor vehicle could render or perform chartered or special passenger service under their certificates, *that the application of appellant should, nevertheless, be granted as a matter of law because these common carriers could not, in fact or law, render or perform contract carrier passenger service*, because Congress provided that contract carrier passenger service should be performed by contract carriers under a permit. Consequently, if these common carriers are correct in their contention, then they have a monopoly in the transportation of passengers, which Congress did not give them. Congress did not permit these common carriers to perform contract carrier passenger service and their opposition is unwarranted. In fact, these common carriers can not render contract carrier passenger service and, if they can not render contract carrier passenger service, then it is unlawful to deny the application of appellant. In opposing the application of appellant, their position to do so, since they cannot render contract carrier passenger service, is no better than the posi-

tion the rail carriers took in Schaffer Transportation v. U. S., 355 U. S. 88, and in that case this Honorable Court struck down the position of the rail carriers as follows:

> "The Supreme Court, Mr. Chief Justice Warren, held that determination by the Interstate Commerce Commission in denying the application on ground that railroad's service presently available was reasonably adequate and that witnesses' main purposes in supporting the application was to obtain lower rates rather than improved service, was improper for failure to evaluate inherent advantages of motor service proposed."

It is clear from the above decision that the Commission was in error and *that the action of the District Court was plainly contrary to the decision of this Honorable Court and law.*

The Commission answered our contention in the following manner, to-wit:

> "The proposed service is not essentially different from that offered and afforded by the opposing motor common carriers."

Congress made it clear that a common carrier is any person which holds itself out to the *general public* to transport passengers for compensation, 49 U. S. C. 303 (14), and that a *contract carrier* is any person which, *under individual contracts or agreements,* transports passengers for compensation, 49 U. S. C. 303 (15). It is clear that there is a great legal difference between a common carrier and a contract carrier, even though the service rendered by each may be essentially the same. One legal difference between a common carrier of passengers rendering charter party service and a contract carrier of passengers rendering passenger service under a

contract is the source of the authority to render the service. No common carrier of passengers can render charter party service *as of a right*, but only at the pleasure of the Commission and under the rules and regulations fixed by the Commission, 49 U. S. C. 308 (c). Contract carriers, on the other hand, *have a right under the Act* to render contract carrier passenger service, 49 U. S. C. 309 (b). The Commission cannot, therefore, lawfully deny the application because the application must be granted if the proposed service is consistent with the public interest and the National Transportation Policy, 49 U. S. C. 309 (b). There is no contract carrier passenger service available, hence the granting of the application is consistent with the public interest and the National Transportation Policy. The denial of the application amounts to the perpetuation of a monopoly in transportation which the common carriers now enjoy and such monopoly is not in the public interest. Congress, provided for contract carrier passenger service, notwithstanding the fact that Congress had also provided for common carrier passenger service with the right of those common carriers to also render, under their certificates, special or chartered parties service. Congress specifically provided that the charter service of common carriers must be rendered under their certificates and that those same common carriers could not render charter service under a permit. Contract carrier service is to be rendered only under a contract by a contract carrier.

The Commission, by denying the application, has denied the public contract carrier passenger service simply because these opposing common carriers contend that they can render essentially the same service as a contract carrier. The public is entitled to contract carrier passenger service as distinguished from service which may be essentially the same as contract carrier service.

The District Court answered our contention that the

denial of the application for authority to render contract carrier passenger service was unlawful by saying:

> "However, we do not agree that the National Transportation Policy adopted by Congress legislated, as the plaintiff contends, that even though a particular type of charter service is made adequately available by common carriers the Commission must nevertheless authorize duplicate service," (contract carrier service and common carrier service are different under the Act, 49 U. S. C. 303 (14) (15) and are not duplicate services,) "whenever the same is tendered by contract carriers who are not common carriers. In other words, we do not believe that Congress in laying down its National Policy, meant that notwithstanding the existence of adequate contract charter service by common carriers," (common carriers cannot render contract carrier service under the provisions of 49 U. S. C. 303 (14) (15) nor does 49 U. S. C. 308(c) authorize common carriers to render contract carrier service,) "the Commission is still compelled to allow duplicate facilities to one who offers contract service exclusively." (J. S. 19 & 20)

It is clear that the District Court has not distinguished between the services possible by a common carrier and the services possible by a contract carrier under the Act. The Court considered the services of each to be the same. Congress made a difference and it is that difference we are trying here to have recognized and when it is, relief will be granted.

THE QUESTIONS

The questions involved in this proceeding, which we respectfully submit require a rehearing and a decision by this Honorable Court are:

(a) Did Congress mean that there shall be two kinds of passenger service, one kind rendered by a common carrier, 49 U. S. C. 303(14), and the other kind rendered by a contract carrier, 49 U. S. C. 303(15)?

(b) Did Congress mean, as the Commission has held, that when common carrier charter party passenger service is available, that contract carrier service of passengers shall not be authorized? And,

(c) Did Congress, by language used in 49 U. S. C. 303(14) (15) and 49 U. S. C. 306 and 49 U. S. C. 309, mean to separate a common carrier of passengers and a contract carrier of passengers or did Congress mean that only common carrier passenger service, as the Commission has held, is available to the public?

ENLARGEMENT OF TIME

The opposing parties filed motions to affirm the judgment of the District Court and those motions were granted by this Honorable Court on January 26, 1959.

The enlargement of time from February 20 to March 20 in which to file petition for rehearing was granted on February 20, 1959, and the parties hereto were so notified thereof by counsel for appellant by sending a copy of the order enlarging the time to each party.

ARGUMENT

If Congress meant, as the opposing common carriers contend and the Commission and the District Court have held, that there is no difference between the services of a common

carrier charter passenger service and a contract carrier passenger service, then there would have been no need for the provisions of 49 U. S. C. 309(b). If, on the other hand, Congress meant that there was a difference between the two services, then that difference has been struck down by administrative discretion and sanctioned by judicial action. If the specific language used by Congress in giving the public also contract carrier passenger service does not apply here, then our relief, if any, must come from Congress.

The opposing common carriers by motor vehicle would have the application denied because a denial would force the public to accept the service of those common carriers regardless of the adequacy or inadequacy of their service. Congress decreed otherwise. These common carriers enjoy a monopoly in passenger service and anything which interferes with that monopoly is contrary to the wishes of these common carriers. Notwithstanding the common carrier charter party service, Congress did also provide that the public shall have contract carrier passenger service. Shall the public have contract carrier passenger service, 49 U. S. C. 309(b), or must the public be denied contract carrier passenger service, is the question we leave for this Honorable Court to decide.

The view that you can see from the top of a hill is not the same view that you can see from a cave or the bottom of a valley. Two can look at the same thing and not see the same object at all. This difference in their viewpoint is accounted for by the place the viewer stands.

We stand at the place where we see that the Act provides for the services of a contract carrier of passengers and where we see that the application of appellant should have been granted. The opposing common carriers stand at a place where they see the opposite. We, therefore, appeal to this Honorable Court to take another look at the record before the Court in this proceeding and examine the provisions of

the Interstate Commerce Act to which we have directed attention and then grant a rehearing and the relief sought by appellant, and we so pray.

NORRIS EDWARD BASS

By: W. G. BURNETTE
Counsel for Appellant

302 7th Street
P. O. Box 859
Lynchburg, Virginia
March 17, 1959

CERTIFICATE OF SERVICE

I, W. G. Burnette, counsel for Norris Edward Bass, doing business as N. E. Bass, Gladys, Virginia, appellant herein, and a member of the Bar of the Supreme Court of the United States, having been admitted to practice on the 13th day of February, 1947, hereby certify that on the 17th day of March, 1959, I served copies of the foregoing Petition of Appellant for Rehearing upon this court and upon the several parties of record in the District Court as follows:

1. On the United States, by mailing a copy in a duly addressed envelope, with postage prepaid, to:

Honorable John Strickler
United States Attorney
Western District of Virginia
Roanoke, Virginia.

The Solicitor General
Department of Justice
Washington 25, D. C.

Honorable Victor R. Hansen
Assistant Attorney General
Department of Justice
Washington 25, D. C.

James E. Kilday, Esq., Attorney
Department of Justice
Washington 25, D. C., and

E. Riggs McConnell, Esq., Attorney
Department of Justice
Washington 25, D. C.

2. On the Interstate Commerce C nmission, by mailing a copy in a duly addressed envelope, with postage prepaid, to:

Honorable Robert W. Ginnane
Chief Counsel
Interstate Commerce Commission
Washington 25, D. C., and

Carroll T. Prince, Jr., Esq., Attorney
Interstate Commerce Commission
Washington 25, D. C.

3. On Atlantic Greyhound Corporation, Carolina Coach Company, Eastern Greyhound Lines, Richmond Greyhound Lines, Inc., and Virginia Stage Lines, Inc., intervening defendants, by mailing copies in duly addressed envelopes with first class postage prepaid, to their respective attorneys of record as follows:

L. C. Major, Jr., Esq.,
Turney & Turney
2001 Massachusetts Avenue, N. W.
Washington 6, D. C., and

William C. Battle, Esq.
Perkins, Battle & Minor
Court Square Building
Charlottesville, Virginia,

Attorneys for intervening defendants.

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